

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000061

03/26/2003

(3) Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382; and (4) Underage Drinking and Driving, a class 1 misdemeanor in violation of A.R.S. Section 4-244.34. Appellant filed a Motion to Suppress and to Dismiss. An evidentiary hearing was held by the Honorable Carol Barry on July 3, 2001. At the conclusion of the evidentiary hearing, the judge denied Appellant's Motion. Thereafter, the parties stipulated to a submission to the court on stipulated evidence. Appellant was found guilty of all charges.

The only issue raised by the Appellant is his claim that he was denied his right to counsel when being advised of the implied consent law. Appellant requested the opportunity to speak with an attorney. Phoenix Police Officer Mark Linder testified that Appellant was arrested at 2:23 a.m. and the time of driving ended at 2:07 a.m. Appellant was advised of the Miranda warnings at 2:52 a.m. and requested the opportunity to speak with an attorney.¹ The record reflects that Appellant made his first phone call at 2:56 a.m.² Officer Linder gave Appellant a phone book.³ Officer Linder stated that he did not limit the length of Appellant's phone calls.⁴ And the Officer did not limit the number of telephone calls Appellant made; in fact, Appellant made three phone calls.⁵ Two of these calls were made after Appellant agreed to take the breath test.⁶ The breath test was administered at 3:08 a.m.⁷

At the conclusion of the evidence, the trial judge found as follows:

Based on the testimony and the evidence that the court has heard, reading both of the motions from the defense and the State, the court does not find that there's been a violation of the Defendant's Sixth Amendment Right to Counsel. It appears that he was given an opportunity to call, he chose who he wanted to call. The case law does not require the State to inquire whether or not you talk to an attorney, and whether or not you are ready to go. The Defendant had the right to say, "I'm not ready to go," and not take the test. That's what the implied consent law tells him; you can either take the test or not. So the court finds there is not a violation of Defendant's Sixth Amendment Rights.⁸

¹ R.T. of July 3, 2001, at pages 5-6.

² Id. at page 9.

³ Id. at page 7.

⁴ Id. at page 9.

⁵ Id. at pages 9-10.

⁶ Id.

⁷ Id. at page 10.

⁸ Id. at page 16.

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Apparently, Appellant used the telephone to call his mother, not an attorney.⁹

A DUI suspect has a limited right to a “reasonable opportunity to consult with an attorney” by telephone without interfering with the State’s need to timely collect evidence of intoxication.¹⁰ In this case Appellant did have an opportunity to call an attorney, but chose instead, to call his mother. Appellant did not request additional time or phone calls to consult with an attorney. This Court finds that Appellant had a reasonable opportunity to contact an attorney. This Court further finds no violation of Appellant’s Sixth Amendment Right to counsel.

At the conclusion of oral argument, this Court directed counsel to prepare supplemental memoranda on the issue of whether one or more charges may be multiplicitous. This Court has received those excellent memoranda, and it appears that the Court and counsel are in agreement that the charges contained in Count 2 (Driving with a Blood Alcohol Content of .10 or Greater) and Count 3 (Extreme DUI) are multiplicitous. In fact, Count 2 is a lesser included offense of Extreme DUI.¹¹ This Court must vacate the conviction for the crime that is the lesser included offense.

IT IS THEREFORE ORDERED affirming Appellant’s convictions as to Counts 1, 3 and 4.

IT IS FURTHER ORDERED vacating and dismissing Appellant’s conviction and the charge contained in Count 2 of Driving With a Blood Alcohol Content of .10 or Greater.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings, if any, in this case.

⁹ Id., at page 9.

¹⁰ Kunzler v. Superior Court, 154 Ariz. 568, 744 P.2d 669 (1987).

¹¹ See State v. Welch, 198 Ariz. 554, 12 P.3d 229 (App.2000).